# EMPLOYMENT TRIBUNALS
## AT AN OPEN ATTENDED PRELIMINARY HEARING

**Claimant:** Mr C Pointon

**Respondent:** Staffline Group plc

**Heard at:** Nottingham **On:** Monday 6 March 2017

**Before:** Employment Judge P Britton (sitting alone)

**Representation**
**Claimant:** Mr J Raftree, Legal Executive
**Respondent:** Miss C Johnson, Consultant

# JUDGMENT

1. The application to amend the claim to include one of victimisation post dismissal pursuant to Section 27 of the Equality Act 2010 is dismissed.

2. The claim for victimisation pre the dismissal is dismissed upon withdrawal by the Claimant.

3. The claim for indirect discrimination is dismissed upon withdrawal by the Claimant.

4. The claim for direct discrimination is dismissed upon withdrawal by the Claimant.

5. he remaining claims of constructive dismissal; unfavourable treatment pursuant to s18 of the Equality Act 2010 ( the EqA); failure to make reasonable adjustments pursuant to s20-22 and harassment pursuant to s26 remain.

6. Directions are hereinafter set out.

# REASONS

**Introduction**

1. The first issue I am going to deal with is an application to amend the existing claim to include one of post employment victimisation pursuant to Section 27 of the Equality Act 2010 (the EqA). The application came into the tribunal via the Claimant's solicitors on 23 December 2016. It comes after I held a second case management discussion in this matter on 25 November. However, the victimisation

issue was not on the agenda on that occasion; indeed it had not been raised in the ET1 or the first case management discussion which I held back on 26 September, and it did not appear in replies to the first tranche of further and better particulars which I had ordered and which came into the tribunal circa 11 October.

2. In terms of the issues I am dealing with today on this topic, what it is about is that the Claimant obtained a job very shortly after he resigned from the Respondent on 21 April 2016. The job he had obtained was with a company called de Poel which undertakes the contract and performance management, what I might describe as a middleman role, for the suppliers of agency labour such as Staffline to major end users in the food industry such as Asda or Sainsbury's.

3. The application to amend is that after about 3 months with de Poel, so by the end of July 2016, the Claimant was dismissed allegedly because it had come to its attention, via Staffline, that he was only able to drive restricted distances. The Claimant pleads that this could only have come about because one of his erstwhile colleagues, Gary Saville, happened to be at de Poel in Knutsford, Cheshire (which is an Asda site at which the Claimant was working) and noted the Claimant. He told him that Andy[1] would make sure that he was dismissed; it seems and because of the fear the Claimant might poach clients away from Staffline. The parting words from Gary as alleged were: "*Andy Coop knows every one in the business is going to tell them you*'re *here and you are fucked*".

4. What the Claimant says is that two days later, he was in fact dismissed by his boss at de Poel for the ostensible reason that I have given.

5. Obviously this is a prima facie clear cut case of victimisation pursuant to s26 of the EqA. The protected act that could be relied upon would be the ET1 including as it does a claim of disability discrimination, it having been presented on 22 July and sent to Staffline by the Tribunal on 3 August. But not engaged today however is that if the victimisation happened before Staffline knew of the Claim, then causatively could the claim get off the ground?

6. Leaving that to one side why has this claim of victimisation been made so late? The Claimant had instructed his solicitors even before he issued his letter of resignation as its clear from its contents. And it was they who drafted and submitted his ET1. This is the same firm, albeit the name has changed, that represent him today. During the course of today Mr Raftree having come without the Claimant and with no statement addressing this vital issue, has contacted his principal, Mr Cooper, who is the sole solicitor practitioner of the firm of solicitors by which Mr Raftree is employed as a legal executive and which is now known as MDL (formerly Templar Law). He has been told, and is instructed to tell me[2] that when Mr Cooper saw the Claimant to prepare the schedule of loss, which was circa 9 October 2016 as it is dated that day and was submitted to the Tribunal on the 11th, and when the former learned that the Claimant had obtained a job shortly after being dismissed from Staffline but then it had ended after three months, that the Claimant had told Mr Cooper that he had left the job because it entailed more driving than he had thought it would. That would fit with Mr Raftree's instructions that the Claimant took the job with de Poel because it would mean that he would be able to base himself in Knutsford, which is only a few miles away from his home in Crewe, and which would mean he could lead a more family friendly life than before because he would not

[1] The alleged lead bully and orchestrator of the Claimant's constructive unfair dismissal from Staffline.
[2] Thus I assume privilege has been waived.

need to undertake the extensive travelling that he had done whilst with Staffline. It would therefore mean that he be able to see more of his children and in that sense help his wife out who also works.

7. In passing, Mr Raftree has also sought to point out to me that in the medical notes before me there is reference to circa February 2016 the Claimant having a driving impairment. The point he endeavours to make albeit without the Claimant present to assist him is that this would fit with the suggestion that the Claimant told De Pole that he had a driving impairment; thus the alleged reason for his dismissal is a camouflage for the real reason which has to do with de Poel acting in response to the seemingly all powerful Andy's bidding. But it is a red herring for the purposes of today. This is because this is not what his own solicitor is saying he was told circa 9th October by the Claimant. And of course it therefore explains why the further and better particulars provided on 19th October and the accompanying e-mail from his solicitors, made no reference to the circumstances of the dismissal from de Poel and thus any application to amend to include a claim of victimisation.

8. As to how Mr Raftree got involved on the victimisation issue, it essentially is that when he took over the full conduct of this case at around the end of November he needed to get further instructions from the Claimant as a result of my orders at the second preliminary hearing. At the first attempt he got nowhere with the Claimant because the latter was unable to emotionally control himself; becoming tearful if pressed on issues. But the Claimant was able to better acquit himself at the second meeting they had, and which was shortly before the application to amend. What emerged in that meeting is that when Mr Raftree started to explore the issue as to the Claimant's loss of the second job and not knowing what Mr Cooper had already been told, the Claimant told him: *"I lost that job because Andy made sure I was got out"* or something like that. So Mr Raftree then explored the issue further with the Claimant; hence the application to the tribunal to amend circa 23 December 2016.

9. As to the vehicle of amending rather than presenting a new claim this accords with ***Prakash v Wolverhampton City Council [UKEAT/0140/06]*.** To turn it around another way, there is no need to bring a new claim as such, which would mean going through ACAS early conciliation and paying an additional fee, when it is post dismissal victimisation causally therefore said to link to the preceding already pleaded acts.

10. But either way the claim is well outside the prescribed three month time limit. On the scenario which I have the claim could have been presented by circa 30 October 2016. Thus it is, approximately two months out of time

11. I can extend time pursuant to s123 of the EqA if I decide that it is just and equitable so to. But it is nevertheless an exceptional course and with the burden of persuading me on the Claimant. I am guided in my approach by ***British Coal Corporation v Keeble & others [1997] IRLR 336 EAT***. The context is obviously very important and thus the timing of the application and what prevented it from being presented previously. I have already covered the facts in that respect. Second of course out of time, although not fatal, is nevertheless a factor to be considered when deciding whether to grant an application and as to which I apply the guidance in ***Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT*** per Mr Justice Mummery, as he then was.

12. As to the nature of the amendment, clearly this is a new claim. As to its merits

and on a matter which is heavily contested by Staffline who have been able to plead to the amendment factually, so clearly they have witnesses they can call, it is entirely a matter of who the tribunal believes. On the face of it, this claim prima facie, causally would link to the first claim. There may be protestations of denial from the Respondent's witnesses but that is an issue for findings of fact by a tribunal. Therefore, looking at this case in terms of its merits, which is a factor a judge can consider, I could not say that this claim had no reasonable prospect or only little reasonable prospect of success.

13. In terms of findings of fact on that, of course it may very well flow from findings of fact made on the mainstream claims already before the tribunal, because invariably findings as to who is to be believed on one issue can have a knock on domino effect on other issues. That cuts both ways.

14. So applying the guidance so far the claim should proceed on its merits and the Respondent is not prejudiced in the sense that it is unable to defend it.

15. But where does the interest of justice lie? Why should Staffline be put to the expense of defending this new claim and thus presumably investigating with de Poel and be at risk in any event of paying compensation if they lose, if there was no valid reason why this claim should not have been brought in time? It is not the fault of the Claimant's lawyers. It is because he gave a very different reason when this second employment ended when giving instructions to Mr Cooper circa 9th October than he gave to Mr Raftree in late December. Why did Mr Pointon not tell Mr Cooper at the first available opportunity that the real reason he had been dismissed from that job was because he had been sacked from it in circumstances which could not be clearer in terms of prima facie allegations as being other than victimisation?

16. Mr Raftree answers that by saying, and we have yet of course to deal with whether or not the Claimant is a disabled person, that there is evidence from the medical notes that the Claimant was by February 2016 showing the resurfacing of what could be depression. This had been something that on the face of it he may have suffered from in 2011; albeit the tribunal is going to need more information about that. He then, which would be around about the time of his psycho somatic heart problems in the summer of 2015, was inter alia being prescribed Citalopram, which is an anti depressant but from the current records only for a short while. Then when matters blew up, particularly over the alleged dishonesty with his expenses issue and which was before he was actually suspended in March 2016, the Claimant presented with an anxiety state, which again is by and large from the records about fears about his heart and in that respect all the tests proved there was nothing wrong with his heart but there is also reference to anxiety and stress. However he was only prescribed anti depressant medication on 29 March 2016 and this was for a two week course. He was not prescribed citalopram again until 18 August and only at the lower dosage of 20mg per day. There is no note showing any referral for therapy or psychiatric intervention or such like. And so there is no evidence that he was unable to give coherent instructions as at 9 October; and which would not fit with the procedural history prior thereto.

17. Furthermore the Respondent makes the absolutely plausible observation that the Claimant was able to go more or less straight from the job with Staffline to a senior demanding role with de Poel and on the face of it fully perform that role. The proposed amendment does not say he was failing ie because of depression.

18. What it all boils down to is that I have this stark conflict on the Claimant's own

instructions. if I look at it in the round and particularly focus on the lateness of the application and the rather unusual circumstances in which it has come to be made, I am not at all satisfied on the evidence before me, and with the burden of proof on the Claimant, that the application to amend could not have brought far earlier on if he had wanted and at a time when he would have been mentally competent to have given instructions. What it means is to me is that at best, the Claimant had a late after thought on this issue.

19. So, balancing the interests of justice and weighing up where the scales should come down and taking the particular circumstances of this case, I have concluded that the interests of justice lie in refusing this application.

**Amendment number 2**

20. The second application to amend is as follows. Put at its simplest, when the claim was originally presented to the tribunal, the Claimant's solicitors knowing that he had had heart problems, pleaded the disability on the basis that it was cardio related. Depression was not pleaded.

21. Subsequent to my ordering the medical notes as to whether the Claimant was prima facie a disabled person and those being provided to the tribunal circa 19 October 2016, at the next preliminary hearing I opined that on the face of it, they appeared to suggest that the issue here was that the Claimant had suffered what appeared to be a psycho somatic heart attack, having presented with a history of alleged cardio problems. But following a battery of tests on more than one occasion, it was definitively concluded by the cardiovascular consultant that he did not suffer from any cardio vascular problem.

22. In that discussion, there emerged however for reasons that I have touched upon, today, that by February 2016, and possibly continuing through, up to and including certainly his resignation, it might be that he was suffering form anxiety/depression. The fundamental of course would be as to whether this constituted a disability as defined at section 6 and schedule 1 of the EqA.

23. As a consequence of that, therefore there is the application to amend. I grant it because it is simply a clarification of the basis upon which disability is advanced consequent upon obtaining the medical notes. The Respondent does not now object to the amendment.

**Withdrawals**

24. The Claimant, via his solicitors circa 21 December 2016 in the light of the second preliminary hearing, withdrew the then claim for victimisation. This relates to alleged victimisation pre the dismissal; it is not on the issue of the employment with de Poel. The claims for direct and indirect discrimination were also withdrawn. Thus I formally dismiss those claims upon withdrawal.

25. This means that the claims proceeding are:

25.1 Unfavourable treatment pursuant to Section 15 of the EqA.

25.2 A failure to make reasonable adjustments pursuant to Sections 20 -22 and which invariably goes with claims of unfavourable treatment under Section 15 and which is simply a relabeling.

25.3 Harassment pursuant to Section 26.

26. I want to make the following observation. In relation to the revised particulars as per the latest Scott Schedule as at 21 December 2016, Mr Raftree accepts he has got himself muddled. Where he refers to harassment and unfavourable treatment pursuant to Section 15, what he meant to plead was harassment pursuant to Section 26 and unfavourable treatment pursuant to Section 15. He has also mixed up the singular with the plural and use of the third person as opposed to simply framing everything in relation to "*the Claimant*". He will now make the required revisions.

**The injury to feelings issue**

27. In the schedule of loss, the Claimant had not referred to injury to feelings. Mr Raftree's instructions now are to amend to include such a claim. I observe, and obviously Mr Raftree will take this on board, that as a schedule of loss, it is in some respects nonsensical. Page 1 refers under the heading compensatory award to what to me is a claim for loss of earnings for two years, although the words loss of statutory rights are then used. For the avoidance of doubt, a loss of statutory rights is an award that can be made on a claim for unfair dismissal, including constructive, should it succeed. It is a nominal sum to reflect the loss of the accrued rights. It is usually pegged to the existing statutory cap maximum wage for the purposes of a basic award at any given time. Thus, in this case, as the statutory cap was £479 at the time, the claim for loss of statutory rights would be confined to £479.

28. So what I think was being attempted was the say under the heading of compensatory award, that the Claimant should be given an award of 2 years' pay, less the earnings when working for de Poel, on the basis he is unlikely to get another job for the remainder of that period. Obviously the Claimant will have to provide all the evidence to show that he has been trying to mitigate his losses, including details of job applications unless he is mentally unable to work in which case medical evidence will be needed.

29 The final point to make is that unless he was to succeed on the Equality Act fronts, he cannot claim for 2 years' loss of earnings. He is capped to one year's earnings at the statutory cap for the prevailing year when he was dismissed: £89,000.

30. The next heading relating to past losses is actually presumably intended to deal with the earnings up to the intended date for determination of this case by a tribunal. What Mr Raftree needs to do is properly structure this schedule as per the ACAS website and all of which I have explained today.

31. The next heading is one of wrongful dismissal. That is correctly set out; the amount is on the face of it correct at £15,692.

32. The next element puzzles me. It is a duplication unless it was meant to include injury to feelings.

33. I now move on to issues that go to credibility. The claim refers to ACAS Code of Practice breaches and thus seeking an uplift of 4 weeks' pay in accordance with the provisions at Section 38 of the Employment Act 2002. Why? Those procedures relate to breaches of the ACAS Disciplinary and Grievance Code of Practice. The Claimant was allowed a grievance in accordance with the procedures of the

Respondent. As I have already made clear, he attended a grievance hearing. He decided not to pursue the appeal but he could have done. Thus, there is no breach. The CP is not there to deal with the quality of what happens in the process, only the process itself. Obviously there was no disciplinary process in this case other than the fact that there was on the face of it a step one investigation; but, more importantly, the Claimant was invited to a disciplinary hearing which meets with step 1 of the processes of the ACAS CP. He was informed of the charges he had to meet, provided with the documentation relied upon and it was made plain to him that he had the right to be accompanied by a colleague or a trade union official. Therefore there is no breach.

34. Then the Claimant says that he never got written particulars of the employment. Thus he pleads under Section 1 of the Employment Rights Act 1996 that throughout this employment over some 11 years with Staffline plc, he never received anything remotely constituting a contract of employment. But I have been shown in the bundle produced before me today by Staffline a letter attaching a contract of employment dated 18 October 2004 and thence a contract signed by the Claimant the following month.

35. The Claimant is obviously going to have to tell the tribunal presumably that his signature was a forgery. If not, he will obviously have to withdraw that claim. That could have consequential impact upon his credibility on other issues.

36. Having said that, going back to this claim for injury to feelings, how it goes is according to Mr Raftree is that the Claimant when his schedule of loss was being prepared, so let us assume circa 9 October, told his solicitor that did not want to claim for injury to feelings because he did not want to be seen as a “soft touch because if he did, he would never work in the industry again”.

37. However, following Mr Raftree obtaining the medical notes he strongly advised the Claimant that he should allow him to plead for injury to feelings as otherwise he would be failing in his legal duty to him. As a consequence the Claimant now seeks so to claim.

38. Is that an amendment? The claim of course itself pleaded the particulars. It left of course the issue of what should be awarded to the tribunal, because the particulars of claim were concerned with setting out the merits of the actual claims. The schedule of loss is equivocal. The position actually is only clarified now. It causes the Respondent no prejudice because it is not going to be prejudiced anyway unless it loses. Therefore I am granting the application to amend the compensation claim so that it has in it a claim for injury to feelings. When we now get what I am sure will be a revised schedule of loss, I require that it is set out clearly that there is a claim for injury to feelings limited of course to the period up to and including the resignation.

**Disability**

39. I do not fault the efforts of the Claimant’s solicitors to seek to get the medical report that I ordered from the GP. They have repeatedly written to the surgery requiring a medical report and as per the tribunal’s SL35A. Only at the eleventh hour, that is to say on 1 March, received by the Claimant’s solicitors on Saturday, has the GP said that he does not think he is qualified to give the required medical opinion.

40. Before dealing with the way forward as to establishing whether the Claimant is disabled, I have the following observation to make and which the Claimant needs to seriously think about. In relation to events up and including his resignation, he relies upon that he was harassed, in particular by reason of the remarks which he refers to, or otherwise being treated unfavourably pursuant to Section 15 in relation to work being taken away from him and all because of his disability. Yet, when he raised his grievance and which was heard on 18 April 2016 and which grievance he had written having sought legal advice, and it is now obvious from his solicitors who are before me, he made no reference whatsoever to health conditions or any link to a potential disability. On the paperwork that I have seen, the most the Respondent knew was that he had had this suspected heart problem and had to have some leave for it but had declined their suggestion that he should perhaps agree to be seen by occupational health. If the Claimant seeks to say that the emails that I have now read are all a forgery, then how is it that there is a reply to at least one of them in the bundle that I have seen today in which he thanks the employee who is helping him (Ray) over his sympathetic approach to matters but that the Claimant in essence does not think he needs to trouble occupational health. He was not off sick for long.

41. Thirdly, his health was not an issue in the grievance meeting. He was sent the minutes, which I have read, and he emailed back thanking HR for their accuracy and the way the meeting had been handled. Yet, he seeks to submit in the Scott Schedule that not only was there concerted disability based discrimination of him post his having been ill over the suspected heart issue, but that the way that his grievance was handled was biased because of the inappropriate relationship between the HR person and Andy.

42. If so, then why the complementary email? I so observe all of this because it indicates that the Claimant has, as I thought might be the case hence the observation I made at the last PH, something of a mountain to climb on the disability front. It is a wholly different issue from the constructive dismissal claim. In that respect, the bullying and harassment referred to can of course constitute a breach of the implied term of trust and confidence. The Claimant does not need to plead disability: after all it is only now that he has decided to claim for injury to feelings, clearly it was not previously of significance.

43. So, the Claimant is asked to consider, although it is not directly related to the employment tribunal regime, the most helpful guidance to litigants in person, and indeed those who represent them, as of very recent time published by Mr Justice Walker in ***Chambers v Rooney***; and the need in particular to stand back and reflect upon which parts of a case to really run as opposed to running a myriad of issues where that is not necessary and many of those issues may be doomed to failure.

44. What that means is that at the present time, I am considering strike out, albeit it an exceptional step, in relation to the disability based claims If I decide that this would be too exceptional a course to take, I am seriously considering as to whether or not to order a deposit in relation to that part of the claim. The Claimant will doubtless appreciate the implications of a deposit order being made and that part of the claim not succeeding. If he does not, then his solicitors should advise him of the implications pursuant to Rule 39(5) (a) of the Employment Tribunals Rules of Procedure 2013, and thus its interface to Rule 76. I am not going to make a deposit order today, I am reserving this issue of strike out or deposit order until another occasion.

45. That leads me back to determining disability. The medical notes do not provide

nearly sufficient to establish that the Claimant was at the material time a disabled person. His current position statement which I ordered on this issue and which came in to the tribunal on 11 October also does not provide nearly enough.

46. The indication I have, and it is no more than that, is that it may be that he has had episodes of feeling low followed by periods of bouncing back up again but never to the extent of being classified as clinically depressed. We are not dealing here with psychosomatic issues; we are dealing with whether or not the heart issues are a manifestation of severe anxiety /depression so as to constitute a disability and which had lasted, or was likely to last, 12 or more months at the date complained of, which ends with his resignation on 21 April 2016. Mr Raftree has told me that by the time he was dealing with the Claimant as at the back end of November, the Claimant was tearful and indeed he had great difficulty on the first occasion in getting instructions. But that was late November 2016.

47. Furthermore, only last week he learned from the Claimant, memory jogged in that sense by his wife, that he has had two serious episodes. First whilst on holiday abroad he left his wife in a nightclub without any money and was the following day found on a beach. Mr Raftree has been assured that none of this episode was alcohol or drug related. Second that the Claimant's wife found him upstairs in the closet, I assume with the door shut, talking to himself. I do not know when these episodes took place. There is no reference to them in the medical notes. Could it therefore be that the Claimant's mental health has deteriorated and in particular from late November onwards given the scenario that Mr Raftree has put before me during the course of today? Of course it is currently speculation absent a statement from the claimant and his wife and/or medical evidence. But I repeat that the core issue is what was the Claimant's condition as at 21 April 2016.

48. I am loath to order the attendance of the GP to answer what I would have thought are very straightforward questions. Therefore, what I am doing is to set out as attached hereto a list of questions that with the consent of the parties are to be sent to the GP. The GP is required to answer those questions by 27 March 2017 unless the claimant withdraws the disability based claims. If he replies saying he is unable to assist because he lacks the necessary professional competency to do so, I only say at this stage that this would surprise me given that GPs are very much in the front line in dealing with depression issues.

**The way forward**

49. I see no point in proceeding further until there is this clarification and the Claimant has put his legal house in ordered and reflected upon my observations. Therefore I stay this matter for 28 days post the promulgation of this judgment at the end of which obviously the parties can inform me of the way forward.

50. To assist the Claimant in considering his position advice the Respondent is at this stage going to send him a copy of his current intended proposed trial bundle. Staffline will also send in a copy for my attention to go on the file.

51. This case is hereby to be single case managed by Employment Judge Peter Britton for the time being to allow continuity.

**Further observation on the harassment case**

52. In terms of the claim of harassment brought under Section 26 of the EqA, the

parties' attention has been drawn by me to the judgment of The Honourable Mrs Justice Elizabeth Laing DBE in ***Peninsula Business Services Ltd v Mr L P Baker*** very recently published on 1 March 2017 [UKEAT/0241/16/RN]. Obviously, the parties' observations on the same if the Claimant is not a disabled person will be required in due course.

Employment Judge Britton

Date:8 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
13 March 2017
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FOR THE TRIBUNAL OFFICE